IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.14 of 1996

Decided on : July 23, 2007

Basant Singh and others **....Appellants.**

VERSUS

Sridhar **....Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellants : Mr. Ashutosh Burathoki, Advocate.

For the Respondent : Mr. R.K. Sharma, Advocate.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appeal was admitted on the following substantial questions of law:

1. Whether the District Judge is justified in setting aside findings of the Trial Court that there exists a path over Khasra No.125 on the ground that these findings are solely based on the spot inspection conducted by it and not supported by any other evidence on record?

2. Whether the District Judge has mis-read and mis-interpreted the pleadings and evidence on record to come to the conclusion that the Appellants-Defendants have not pleaded and proved that they have easementary right over khasra No.125 by way of prescription?

3. First, the factual matrix may be noticed. Appeal was Defendants-appellants are aggrieved by the judgment and decree of the trial Court, dated 31st May, 1995, as affirmed by the first Appellate Court vide judgment and decree dated 1st November, 1995, whereby the suit filed against them by plaintiff-respondent Sridhar, has been decreed and

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Whether the reporters of the local papers may be allowed to see the Judgment?

they have been restrained by way of permanent prohibitory injunction from causing any interference in the land of the plaintiff-respondent, which is comprised in Khasra No.125, situate in Mohal Pandtirh, Mauza Passu, Tehsil Dharamshala, District Kangra, H.P.

4. Plaintiff-respondent filed a suit for permanent prohibitory injunction restraining the defendants-appellants from causing interference in his land comprised in Khasra No.125 situated in the aforesaid village, alleging that the defendants-appellants, without any right, title or interest in the suit land, have been causing interference. Defendants-appellants took the plea that they had the right of passage through the land bearing Khasra No.125 and that the total length of the passage was 400 mitres from the road head to a *Bowli* and that a portion of this passage, to the extent of 20 mitres, passes through Khasra No.125.

5. Parties went to trial. Witnesses were examined by both the sides. Some documents, in the form of the report of the Panchayat and the report of Tehsildar, were also proved. The trial Court felt the necessity of visiting the spot with a view to appreciating the evidence led by the parties. During the course of the spot inspection, it was noticed that the passage, as claimed by the defendants-appellants, was in existence.

6. Trial Court held, specifically vide para-9 of its judgment, that the spot inspection and the note containing the observations made in the course of such inspection indicated that the evidence led by the defendants-appellants about the existence of passage through the land, in question, was correct, while the evidence led by the plaintiff-respondent that there existed no path was incredible. However, the trial Court decreed the suit with the observation that the defendants-

appellants had not led any evidence that the passage had been in existence for statutorily prescribed period of 20 years for acquisition of right of easement or a customary right. The view taken by the trial Court on the face of it is incorrect. Evidence on record suggests that the residents of the village had been making use of the passage since the times of their ancestors.

7. Appeal was filed by the defendants-appellants in the Court of District Judge. The same has been dismissed by the learned District Judge with the observation that the spot inspection alone and the facts noticed in the course of such spot inspection by the Presiding Officer of the Court can not become the basis of decision of disputed questions of fact. The first Appellate Court has not touched and discussed the evidence led by the parties despite the fact that the trial Court very categorically stated in its judgment that the parties led evidence with respect to the point whether their existed a passage or not and that evidence led by the defendants-appellants was credible while that led by the plaintiff-respondent was incredible.

8. I have been taken through the entire evidence. Appellants examined two witnesses, including one of them, and both of them testified that there existed a passage on the spot. The oral evidence led by the appellants is corroborated by the report of a witness examined by the plaintiff-respondent, namely PW-3 Chudhary Ram, which he made to the SHO long before the institution of the suit and in that report, which he appended on an application moved by 51 persons of the area, he recorded that there existed a passage and also a culvert over a *Kuhl* and that culvert and passage had been damaged by plaintiff-respondent Sridhar and since the matter was not cognizable by the Panchayat, the complaint was being sent to the police for necessary action. Even

though PW-3 Chaudhary Ram testified in favour of the plaintiff-respondent but his aforesaid report Ex. PW-3/A falsifies his testimony that there exists no path on the spot.

9. One Tehsildar also visited the spot in connection with the proceedings under Section 133 of the Code of Criminal Procedure, which were initiated against the plaintiff-respondent and the other persons, who allegedly damaged the culvert and the path and the said Tehsildar reported vide report Ex. DW-1/As that the path existed on the spot and a portion of it passed through the land of the plaintiff-respondent.

10. In view of the above discussed evidence, the two Courts below were not justified in decreeing the suit. Trial Court has not noticed the evidence to the effect that the passage had been in existence since the times of the ancestors of the defendants-appellants. The first Appellate Court has not at all taken into account the evidence led by the parties and has disposed of the appeal in a slip-shod manner. Thus, the two Courts below have not considered and appreciated the evidence on record correctly and in its right perspective.

11. As a result of the above discussion, both the substantial questions of law, on which the appeal was admitted, are answered in favour of the defendants-appellants. Consequently, appeal is accepted, judgment and decree of the trial Court, as affirmed by the first Appellate Court, are set aside and the suit of the plaintiff-respondent is dismissed.

12. Appeal stands disposed of.

July 23, 2007(sd) **(Surjit Singh), J.**